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In The

Supreme Court of the United States

October Term 1977

No. 77-888

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

JURISDICTIONAL STATEMENT

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CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of a three-judge court of the United States District Court for the District of Nebraska entered on October 14, 1977, declaring a statute of the State of Nebraska to be unconstitutional and enjoining the State of Nebraska as hereinafter set forth.

OPINION BELOW

The judgment appealed from of the United States District Court for the District of Nebraska dated October 14, 1977, which is unreported, and a Memorandum of Decision and Order, both dated September 12, 1977, supporting said judgment, all of which are unreported, are annexed hereto as Exhibit A.

JURISDICTION

This is a civil rights action brought pursuant to 42 U. S. C. § 1983, 28 U. S. C. § 1343 (3) and (4), and 28 U. S. C. §§ 2201 and 2202 declaratory relief that Section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976) is unconstitutional under the Fourteenth Amendment to the Constitution of the United States and attendant injunctive relief.

A three-judge district court was convened below pursuant to 28 U. S. C. § 2281, which was repealed by Public Law 94-381, Sec. 2, 90 Stat. 1119 but which repeal was not applicable to any action commenced on or before August 12, 1976. The present action was commenced on November 12, 1975.

On October 14, 1977, pursuant to a Memorandum of Decision and Order entered on September 12, 1977, the district court entered the final judgment which is sought to be reviewed herein, and a Notice of Appeal was filed on October 21, 1977, in the United States District Court for the District of Nebraska.

Jurisdiction to review by direct appeal the judgment of the United States District Court is conferred by 28 U. S. C. § 1253.

Section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976) found in Volume 5, page 1112 of the official edition of the Nebraska Revised Statutes, which the United States District Court found to be unconstitutional, provides as follows:

> "(1) When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.
>
> "(2) When the physician or psychologist designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside

the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to, and for the care, custody and security of the person in, such hospital or psychiatric facility. While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Department of Correctional Services, and shall be returned to the department when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

"(3) When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect."

A copy of the Notice of Appeal herein is set forth in the Appendix as Exhibit B.

———o———

QUESTIONS PRESENTED

1. Whether a constitutionally convicted felon who has been sentenced to the Nebraska Department of Correctional Services has any process due prior to his transfer from the penitentiary, to which he has been assigned within said department, to a mental hospital within the Department of Public Institutions of the State of Nebraska, when confinement in said hospital is within the sentence imposed upon him?

2. If process is due under question 1, what procedures are required by the Fourteenth Amendment of the United States Constitution in these circumstances?

———o———

STATEMENT OF THE CASE

Plaintiff-Intervenor, Larry D. Jones (appellee), was duly convicted of the crime of robbery under Nebraska law in the District Court of Douglas County, Nebraska, and was sentenced to the Department of Correctional Services for a term of three to nine years and commenced serving said term at the Nebraska Penal and Correctional Complex, a division of the Department of Correctional Services, on or about May 31, 1974. In April of 1975 said Larry D. Jones was involuntarily transferred to the Lincoln Regional Center Security Building, a facility of a state mental hospital operated by the Department of Public Institutions of the State of Nebraska. While in said mental hospital, the inmate remains subject to the jurisdiction and custody of the Department of Correctional Services.

The maximum sentence of appellee, Larry D. Jones, will not expire until May 30, 1983, subjecting him to the custody of the Department of Correctional Services until the expiration of said sentence. William George Foote and Charles Miller (appellees) have both received their final discharge after having served their maximum sen-

tences and were no longer subject to the custody of the State of Nebraska prior to the entry of the Memorandum of Decision and judgment herein (Appendix Ex. A) and the case is moot as to them.

Said Larry D. Jones was transferred to the mental hospital, as above described, in accordance and compliance with the provisions of section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976), set forth above. He subsequently intervened in the present case, alleging that the foregoing statute was unconstitutional on its face and as applied by defendants and that this transfer to the said mental hospital was not within procedural due process requirements. Most of the evidence was stipulated or otherwise uncontested.

REASONS REQUIRING PLENARY CONSIDERATION

The conclusion by the court that process was due these prison inmates for transfer from one institution to another authorized by the sentence imposed appears to be contrary to the recent cases of this court of *Meachum v. Fano*, 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532, and *Montanye v. Haymes*, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543. Briefly, the statutory system of the State of Nebraska for the custody of persons convicted of felonies provides, in addition to the statute above set forth, that: (1) The Director of the Department of Correctional Services shall designate the place of confinement of persons committed to the department (subject to the provisions of section 83-176—not applicable here) (83-173, Neb.

Rev. Stat. 1943 (Reissue 1976), Appendix, Ex. C); (2) whenever a person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Service or to the custody of the warden, he shall be deemed to be sentenced to the department. The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another (83-176, Neb. Rev. Stat. 1943 (Reissue 1976), Appendix, Ex. C); (3) upon his initial admission to the facility each person committed to the department shall be given a thorough evaluation including physical, psychological, social, educational and vocational. A report shall be made including recommendations regarding the facility to which such person should be assigned and the program of treatment for his rehabilitation, including medical and psychological treatment (83-179, Neb. Rev. Stat. 1943 (Reissue 1976), Appendix, Ex. C).

This court has already recognized that transfer within the state system contemplated by the criminal sentence does not give rise to a procedural due process right—that was accomplished in the criminal conviction.

In *Montanye v. Haymes, supra,* this Court stated in part:

> "We also agree with the State of New York that under the law of that State Haymes had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct. Under New York law, adult persons sentenced to imprisonment are not

> sentenced to particular institutions, but are committed to the custody of the Commissioner of Corrections. He receives adult, male felons at a maximum-security reception center for initial evaluation and then transfers them to specified institutions. NY Correc Law § 71(1) (Supp. 1975-1976); 7 NYCRR § 103.10. Thereafter, the Commissioner is empowered by statute to 'transfer inmates from one correctional facility to another.' NY Correc Law § 23(1) (Supp. 1975-1976). . . ."

The same is true as to *Meachum v. Fano, supra.*

In the present case the district court recognized that the Supreme Court held in those cases that there was no due process clause liberty interest in such transfers unless there was some right or justifiable expectation rooted in State law that the inmate would *not* be transferred. It then attempts to distinguish the present case by stating that:

> ". . . [T]here was an objective expectation, firmly fixed in state law and official Penal Complex practice, that a transfer would not occur except when the inmate suffers from mental disease or defect and that it cannot be adequately treated at the Penal Complex. . . ."

The foregoing quote by the district court is a misreading of section 83-180, Neb. Rev. Stat. 1943 (Reissue 1976), held by said court to be unconstitutional. That statute does not give the inmate an objective expectation that a transfer would not occur as stated by the district court above, but clearly gives him an expectation that he may be transferred if the physician or psychologist finds that he suffers from a mental disease or defect and is of the opinion that the person cannot be given proper treatment in the facility in which he is in. In the light of the

positive wording of this statute, together with the other state statutes mentioned above (Appendix, Ex. C), there is no objective expectation fixed in state law that a person, after classification, will remain in any one institution.

Neither is due process triggered as it was in *Morrissey v. Brewer,* 408 U. S. 471 (parole), *Gagnon v. Scarpelli,* 411 U. S. 778 (probation), or *Wolff v. McDonnell,* 418 U. S. 539 (good time), all of which were based upon the taking away of a positive grant affirmatively conferred by state law.

This Court further stated in *Montayne v. Haymes,* 427 U. S. 236 at 242:

> ". . . As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. . . ."

In the present case the district court put great reliance upon its findings that transfer to a mental hospital carried stigmatizing consequences, behavior modification, etc. amounting to a "grievous loss" citing *Wolff v. McDonnell* and *Morrissey v. Brewer, supra.* These considerations would seem to be irrelevant where the transfer is within the sentence imposed and not otherwise violative of the Constitution. (There was no challenge or finding that the conditions in the hospital or other areas within or without the Penal Complex where inmates may be transferred were violative of the Constitution.)

———o———

IF PROCESS IS DUE, WHAT STEPS ARE REQUIRED?

The three-judge district court not only held that all of the requirements of *Morrissey v. Brewer, supra, Gagnon v. Scarpelli, supra,* and *Wolff v. McDonnell, supra,* must be followed but also added the requirement that legal counsel, furnished by the state, if the inmate is financially unable to furnish his own, must be made available. This, in spite of the fact that this Court considered but refused to make a requirement of legal counsel in all three of the above cases (Memorandum of Decision, App. pp. 12 and 13, Appendix, Ex. A).

———o———

OTHER SUBSTANTIAL CONSIDERATIONS

The three-judge court rendering the judgment in the present case consisted of two of the three district judges for the District of Nebraska and a judge from the United States Court of Appeals for the Eighth Circuit. If this judgment is permitted to stand, the officials of the Department of Correctional Services and the Department of Public Institutions wil be constrained to follow its burdensome procedures, not only in every case of a transfer of a prison inmate to a mental hospital, but also in transfer of other inmates to facilities outside the Department of Corrections under the threat or fear of forfeiting their qualified immunity (thus encouraging actions for damages) for knowing failure to follow this precedent in the district.

Obviously, if they cannot transfer Larry D. Jones, appellee, while he is in custody, they cannot, without such procedure, transfer any other prison inmate for similar treatment or rehabilitation.

This Court has already pointed out the problems to a requirement of counsel, equally apropos here, in *Morrissey Scarpelli,* and *Wolff, supra.*

Respectfully submitted,

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APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE, WILLIAM McKINLEY HINES, and LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

(Filed October 14, 1977)

JUDGMENT

Dept. of Justice, September 13, 1977, State of Nebraska

Pursuant to the memorandum of decision of September 12, 1977, filing 57, and the proposals for release subsequently submitted by the parties,

IT HEREBY IS ADJUDGED AND DECREED:

1. That § 83-180 (1), Nebraska R. R. S. 1943, is declared to be unconstitutional as applied to the plaintiffs in that it denied the plaintiffs due process of law;

2. That this lawsuit is moot as to the plaintiff Charles Miller and as to the plaintiff-intervenor William George Foote and the action is therefore dismissed as to them; and

3. That the defendants are enjoined from transferring the plaintiff-intervenor Larry D. Jones, at any time before his complete discharge from the custody of the State of Nebraska on the criminal sentence which he is now serving, from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except by a procedure which includes each of the following:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause

for not permitting such presentation, confrontation, or cross-examination;

D. An independent decisionmaker;

E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

G. Effective and timely notice of all the foregoing rights.

Dated October 14, 1977.

By THE COURT:

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE, WILLIAM McKINLEY HINES, and LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

(Filed September 12, 1977)

MEMORANDUM OF DECISION

Dept. of Justice, September 13, 1977, State of Nebraska

APPEARANCES: For plaintiff and plaintiffs-intervenors, Thomas A. Wurtz

For defendants,
Mel Kammerlohr, Assistant Attorney General

Four[1] men who have been transferred involuntarily from the Nebraska Penal and Correctional Complex to the Security Unit of the Lincoln Regional Center because of claimed mental disease or defect challenge the constitutionality of the state statute under which they were transferred.

The action is brought pursuant to 42 U. S. C. § 1983 and jurisdiction is granted by 28 U. S. C. §§ 1343 (3) and (4), as well as 28 U. S. C. §§ 2201 and 2202, which authorize declaratory and injunctive relief.

Under attack is § 83-180, R. R. S. Neb. 1943[2], which provides:

". . . [W]hen a physician or psychologist designated by the [Director of Correctional Services] finds that a person committed to the [Department of Correctional Services] suffers from a mental disease or defect, the chief executive officer may order such per-

son to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the Department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary."

Much of the evidence was stipulated or otherwise uncontested. Each of the plaintiffs was separately convicted for violations of Nebraska criminal law and sentenced to the Department of Correctional Services to a term of years. Each plaintiff began serving his term in the Nebraska Penal and Correctional Complex, which is within the Department of Correctional Services, but was involuntarily[3] transferred to the Lincoln Regional Center, which is not within the Department of Correctional Services but is within the Department of Public Institutions. Each was transferred without any formal notice or hearing or any safeguard other than determinations by one or more psychiatrists that the prisoner suffered from a mental disease or defect and that he could not be given proper treatment in the Nebraska Penal and Correctional Complex.

Inmates at the Penal Complex are provided access to certain psychiatric care and treatment, but the institution does not have a staff and facilities necessary to provide for all mental health needs which may arise. It does have a psychiatric care unit, which can be used as living

quarters for inmates whose conditions require that they be separated from the general population, and a hospital, where more closely guarded and segregated conditions may be imposed. Inmates within the psychiatric care unit or the prison hospital are subjected to a schedule more restrictive than that of the general prison population, but are not required to undergo psychiatric treatment involuntarily.

The Security Unit of the Lincoln Regional Center is a hospital owned and operated by the State of Nebraska for the purpose of treatment of emotional and mental disorders. Patients there, including inmates transferred from the Penal Complex, are frequently required to participate in behavior modification programs and to take whatever medication may be prescribed for them. Confinement conditions are substantially more restrictive than those at the Penal Complex in that the patients have less freedom of movement, are under constant supervision, have substantially fewer recreational and vocational opportunities, are unable to earn money, and must spend most of their time in their wards. When the Lincoln Regional Center determines that an inmate no longer needs to remain at the Lincoln Regional Center, arrangements are made to return the prisoner to the Penal Complex.

I.

The Fourteenth Amendment to the Constitution of the United States forbids any State to "deprive any person of . . . liberty . . . without due process of law." When a person already has lost much of his liberty because he is imprisoned, not every change of status while he is im-

prisoned amounts to a loss of "liberty" within the meaning of the Constitution. The opinions in *Meachum v. Fano*, 427 U. S. 215 (1976), and *Montayne v. Haymes*, 427 U. S. 236 (1976), are to the effect that it is not merely the gravity of the disadvantage imposed upon the prisoner by changes of location that determines whether the liberty interest is entitled to the protection of due process. The court in *Montayne* said at page 242:

> "We held in *Meachum v. Fano* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events."

The plaintiffs here were not transferred from one "prison" to another but from a prison to a state mental hospital for both a continuation of their prison terms and for mental treatment. The prison and the hospital properly may be equated for due process purposes.[4] The evidence shows that transfers to the Lincoln Regional Center are conditioned upon a finding that the prisoner suffers from a mental disease or defect and cannot be adequately treated within the Penal Complex. The statute under which the plaintiffs' transfers were made specifically so states. Furthermore, the evidence shows that transfers to the Lincoln Regional Center are so conditioned in practice. Inmates are not assigned to the Lincoln Regional Center for any administrative or correctional purposes. Therefore, there was an objective expectation, firmly fixed in state law and official Penal Complex practice, that a transfer would not occur except when the inmate suffers from

a mental disease or defect and that it cannot be adequately treated at the Penal Complex. This case, therefore, comes within the exception noted in *Meachum*. Furthermore, the fact of greater limitations on freedom of action at the Lincoln Regional Center, the fact that a transfer to the Lincoln Regional Center has some stigmatizing consequences, and the fact that additional mandatory behavior modification systems are used at the Lincoln Regional Center combine to make the transfer a "major change in the conditions of confinement"[5] amounting to a "grievous loss"[6] to the inmate. We therefore hold that due process attached to the plaintiffs' liberty interest, and the task of the court is to determine what process is due and whether the procedures provided to these plaintiffs were adequate. See *Morrissey v. Brewer*, 408 U. S. 471, 484 (1972).

II.

Because due process is a flexible concept to be fitted to each setting, some analytical framework is helpful in deciding the specific steps that fit a specific setting. *Mathews v. Eldridge*, 424 U. S. 319, 334-355 (1976), suggests

> "... [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e. g.*, *Goldberg v. Kelly, supra*, at 263-271."

As to the first factor, the private interest in this case is the plaintiffs' interest in avoiding the entry of a more controlled confinement and being labeled mentally ill. Because the plaintiffs have already been deprived of much of their freedom of choice, this private interest is not identical to the interest of nonprisoners who are being considered for civil commitment, as in *Doremus v. Farrell,* 407 F. Supp. 509 (U. S. D. C. Neb. 1975). Entry into a mental hospital still carries some distinctive stigma, which in the specific setting of this case is accompanied by techniques of behavior modification[7] not used at the Penal Complex, so the interest of the plaintiffs is not the same[8] as that of other prisoners who are being considered for transfer from one prison to another, as in *Meachum,* supra, and *Montayne,* supra, or that of other prisoners who are being taken through prison disciplinary proceedings, as in *Wolff v. McDonnell,* 418 U. S. 539 (1974).

Second, the risk of an erroneous deprivation of these private interests is relatively high where the only safeguard used is the opinion of one physician or psychologist without opportunity for anyone—the prisoner or anyone on his behalf—to question that opinion. This is especially true because the inmate may be mentally unable to understand or to challenge the conclusions. Other procedural safeguards, such as written prior notice, a hearing, written findings, and someone to speak for the one claimed to be mentally ill, have self-evident value in reducing the risk.

Third, the state's interest in placing a mentally ill person into the institution best equipped to treat him is strong and deserves primacy. Swiftness does not appear to be a major need, in view of the availability at the Penal Complex of physical security, some psychiatric and psychological staff, and a hospital. Hazards of calling witnesses at a hearing, either within or outside the Penal Complex, whether those witnesses are prisoners or non-prisoners, are certainly less when the issue is whether the inmate is mentally ill than when the issue is whether the inmate has committed some infraction for which he should be disciplined.[9] Usually, the witnesses in a mental hearing will be nonprisoners.

In *Morrissey v. Brewer,* 408 U. S. 471 (1972), the court listed six procedural safeguards as minimal requirements of due process where the issue was what process is due a parolee on revocation of his conditional liberty:

1. Written notice of the claimed violations of parole;
2. Disclosure at a hearing of the evidence in support of the state's claim;
3. An opportunity to be heard in person and to present witnesses and documentary evidence;
4. The right to confront and cross-examine witnesses (unless the hearing officer specifically found good cause for not allowing confrontation);
5. A hearing before a neutral and detached hearing body, members of which do not need to be judicial officers; and
6. A written statement by the decisionmaker as to the evidence relied upon and the reasons for any adverse decision.

Each of these, and others, will be discussed in terms of a proceeding to determine whether a prisoner should be transferred to a mental hospital.

Formal notice that transfer to a mental hospital is being considered, disclosure to the prisoner of the evidence being relied upon for the transfer, and an opportunity to

be heard in person and to present documentary evidence are so fundamental that little discussion of them is needed. See *In re Gault,* 387 U. S. 1 (1967). We perceive no consideration that militates against requiring those basic and vital procedures.

Calling of witnesses by the defense and confronting of all witnesses called by the state stand on a somewhat different footing. It cannot be denied that friction between prisoners arising in or because of a hearing at which prisoners testify against prisoners is a relevant factor, at least when the hearing is within the prison, but the nature of the inquiry in a mental hearing holds a sufficiently low possibility of friction that it appears to us there is a right to call witnesses and to confront and cross-examine witnesses, except upon a finding, not arbitrarily made, of good cause for not permitting each as to a particular witness.

A neutral and detached hearing body is essential. While a judicial officer is not required, and the decisionmaker need not be from outside the prison or hospital administration,[10] at least the examining or treating physician or psychologist should not be permitted to vote on the commitment decision.[11] A written statement by the factfinding body as to the evidence relied upon and the reasons for transferring the inmate should be made. We see no relevant factors different from those noted by the court in *Wolff v. McDonnell,* 418 U. S. at 565.

The availability of counsel is as critical to a prisoner who may be mentally ill as it is to a nonprisoner in the same condition. The capability to examine, understand, evaluate and challenge the process and the evidence is

vital and there may be nobody available to do so, unless it be by counsel, furnished by the state, if need be, because of indigency. The state's interest in avoiding hearings having an adversary cast which may tend to obstruct achievement of correctional goals, recognized in *Wolff v. McDonnell,* 418 U. S. at 569-570, are overshadowed by the disability which accompanies one who is mentally ill.

It should be apparent that the prisoner's rights are largely illusionary unless he knows those rights. The procedure, therefore, should assure notice of them to him.

Accordingly, § 83-180 (1), R. R. S. Neb. 1943, is unconstitutional as applied to the plaintiffs, because none of the foregoing rights was afforded the plaintiffs.

To recapitulate, the minimal requirements of due process when a person is transferred from the Nebraska Penal and Correctional Complex to the Lincoln Regional Center are these:

A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

D. An independent decisionmaker;

E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

G. Effective and timely notice of all the foregoing rights.

This opinion does not seek to determine whether there are other procedures that would be useful or the best way to implement the constitutional demands. Those are matters for the legislative process and not for the courts.

III.

Pursuaded as we are that § 33-180(1) is unconstitutional as applied to these plaintiffs because of due process infirmities, we resolve the action on that basis. A prime obstacle to resolving the case on equal protection grounds, as was done in *Baxtrom v. Herold,* 383 U. S. 107 (1966), is that an equal protection analysis requires a comparison of the § 83-180(1) procedure with a more favorable procedure afforded persons not in the class described in § 83-180(1). At the time the plaintiffs were transferred to the Lincoln Regional Center, the procedure used for committing nonprisoners to mental hospitals was constitutionally defective. It was so declared in *Doremus v. Farrell,* supra, as failing to provide due process. That procedure, therefore, is a poor standard for comparison purposes. The present procedure for civil commitments, found in § 83-1001, et seq., became effective on April 6, 1976, which was after the plaintiffs were transferred to the Lincoln Regional Center. We do not mean to say that an equal protection analysis could not be made; we mean only that hurdles exist which

need not be cleared. Even under an equal protection analysis, the ultimate question of the propriety of differentiating procedures for prisoners and nonprisoners probably depends upon a weighing of the factors discussed in this opinion regarding due process. Whether the Nebraska legislature ultimately decides to use a procedure for transferring prisoners to a mental hospital that differs from that for committing nonprisoners must be left to the good judgment of the legislature, limited only by constitutional strictures.

IV.

The precise relief to be ordered for the individual plaintiffs should be fashioned after suggestions from counsel. The order which is filed at the time of this memorandum will require the making of specific proposals.

The foregoing memorandum of decision constitutes the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.

Dated

BY THE COURT:

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

Footnote 1. On August 18, 1976, this action was certified as a class action by Charles Miller on behalf of all persons presently confined in the Lincoln Regional Center, Security Building, who have been transferred there from the Nebraska Penal and Correctional Complex pursuant to §§ 83-179 and 180, and all persons presently confined to the Nebraska Penal and Correctional Complex. Following a hearing, however, the action was decertified. William McKinley Hines, William George Foote, and Larry D. Jones were added as individual plaintiffs-intervenors thereafter on their motions. Hines was returned to the Nebraska Penal and Correctional Complex and has been released on parole. No evidence has been offered to support his claim and the action evidently is no longer being pursued by him, so his claim will be dismissed. Foote and Miller have been returned to the Nebraska Penal and Correctional Complex, but remain subject to the procedures in § 83-180.

Footnote 2. Mentioned also in the complaint is a challenge to § 83-179, which provides for an evaluation of persons upon initial admission to a state institution, but this statute was not responsible for the transfer of any of the plaintiffs to the Lincoln Regional Center and it need not be dealt with separately in this case.

Footnote 3. The involuntariness of the transfer of Larry D. Jones is not crystal clear from the evidence, because he was asked by the examining psychiatrist before his transfer whether he wanted to be transferred and he said that he did, but he was offered no procedure by which he could receive independent advice on the subject and he may well not have been competent to exercise a free choice.

Footnote 4. Section 83-176, R. R. S. Neb., declares that whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services, "he shall be deemed to be sentenced or committed to the Department." The

Director of Correctional Services, according to the statute, is authorized to designate as the place of confinement of any person committed to the department "any available, suitable or appropriate residence facility or institution, whether or not operated by the state, and may transfer such person from one place of confinement to another," with some declared restrictions as to minors.

Footnote 5. See *Wolff v. McDonnell,* 418 U. S. 539, 571-572, n. 19 (1974).

Footnote 6. *Morrissey v. Brewer,* 408 U. S. 471, 482 (1972).

Footnote 7. The evidence before us would not support a statement like that made in *United States ex rel. Schuster v. Herold,* 410 F. 2d 1071, 1078 (C. A. 2nd Cir. 1969):

> ". . . Yet he [the transferred prisoner] will be confined with men who are not only mad but dangerously so. . . . [H]e will be exposed to physical, emotional and general mental agony. Confined with those who are insane, told repeatedly that he too is insane and indeed treated as insane, it does not take much for a man to question his own sanity and in the end to succumb to some mental aberration."

Footnote 8. These techniques were only generally described at the trial, but appear to include medication.

Footnote 9. For a discussion of the hazards related to disciplinary hearings, see *Wolff v. McDonnell,* 418 U. S. at 566-569.

Footnote 10. See *Withrow v. Larkin,* 421 U. S. 35 (1975): *Hortonville Joint School District v. Hortonville Education Association,* 426 U. S. 482 (1976); *Wolff v. McDonnell,* 418 U. S. at 570-571 (1974).

Footnote 11. See *Doremus v. Farrell,* 407 F. Supp. 509, 517 (U. S. D. C. Neb. 1975), and cases cited there.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE,
WILLIAM McKINLEY HINES,
and LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, et al.,

Defendants.

ORDER

(Filed September 12, 1977)

Pursuant to the accompanying memorandum of decision,

IT HEREBY IS ORDERED:

1. That William McKinley Hines is dismissed as a plaintiff-intervenor; and

2. That counsel shall submit to the court within fifteen days of the date of this order specific proposals for the relief to be granted to the plaintiffs, consistent with such memorandum of decision.

Dated September 12, 1977.

BY THE COURT

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV75-L-172

CHARLES MILLER,

Plaintiff,

and

WILLIAM GEORGE FOOTE and
LARRY D. JONES,

Plaintiffs-Intervenors,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

NOTICE OF APPEAL

Notice of appeal is hereby given by the defendants listed from the Judgment entered hereon on or about October 14, 1977, except paragraph 2 thereof.

This appeal is taken pursuant to 28 U. S. C. § 1253, 28 U. S. C. § 2281, and 28 U. S. C. § 2282 from the judg-

ment of a three-judge court enjoining state officers from enforcing the provisions of a Nebraska state statute because of its unconstitutionality, which action was commenced on or about the 12th day of November, 1975.

Respectfully submitted,

JOSEPH VITEK, et al.,
Defendants

By PAUL L. DOUGLAS
Attorney General of Nebraska

By /s/ Melvin Kent Kammerlohr

Melvin Kent Kammerlohr
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been served upon the opposing counsel of record, Mr. Thomas A. Wurtz, the only party required to be served in this action, by mailing said copy, first class postage prepaid, addressed to Mr. Thomas A. Wurtz, University of Nebraska College of Law, Lincoln, Nebraska 68583.

Dated this 21st day of October, 1977.

/s/ Melvin Kent Kammerlohr

Member of the Bar of the Supreme Court of the United States

EXHIBIT C

83-173. Director of Correctional Services; duties. The Director of Correctional Services shall:

(1) Supervise and be responsible for the administration of the Department of Correctional Services;

(2) Establish, consolidate, or abolish any administrative subdivision within the department and appoint and remove for cause the heads thereof, and delegate appropriate powers and duties to them;

(3) Establish and administer policies and programs for the operation of the facilities in the department and for the custody, control, safety, correction and rehabilitation of persons committed to the department;

(4) Appoint and remove the chief executive officer of each facility and delegate appropriate powers and duties to him;

(5) Appoint and remove employees of the department and delegate appropriate powers and duties to them;

(6) Make rules and regulations for the management, correctional treatment and rehabilitation of persons committed to the department, the administration of facilities, and the conduct of officers and employees under his jurisdiction;

(7) Designate the place of confinement of persons committed to the department subject to the provisions of section 83-176;

(8) Collect, develop and maintain statistical information concerning persons committed to the department,

sentencing practices and correctional treatment as may be useful in penological research or in the development of treatment programs;

(9) Provide training programs designed to equip employees for duty in the facilities and related services of the department and to raise and maintain the educational standards and the level of performance of such employees;

(10) Transmit annually to the Governor and the Director of Public Institutions a report of the operations of the department for the preceding calendar year, which report shall be transmitted by the Governor to the Legislature; and

(11) Exercise all powers and perform all duties necessary and proper in carrying out his responsibilities.

83-176. Director of Correctional Services; designate place of confinement; minor serious threat to safety; how determined. (1) Whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden or superintendent of such facility, he shall be deemed to be sentenced or committed to the department.

(2) The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another subject to the following:

(a) A minor declared neglected, dependent, or in need of special supervision pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women, or any other facility designated primarily for the imprisonment of adult offenders.

(b) A minor declared delinquent pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the Nebraska Center for Women or any other facility designed primarily for the imprisonment of adult offenders, unless he is sixteen years of age, or older, and he is a serious threat to the safety of persons in other facilities. The determination as to whether the minor is a serious threat to safety shall be made only after juvenile court hearing in the court of original disposition, at which the minor shall have the right to be represented by counsel.

83-179. Person committed; physical examination; evaluation; contents; recommendations. Upon his initial admission to a facility, each person committed to the department shall be given a physical examination and a thorough evaluation. He shall be kept apart from other persons committed to the department until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommenda-

tions regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.